Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-398

FORREST GERRY, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1975

No.

FORREST GERRY, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, The Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner, Forrest Gerry, Jr., respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 17, 1973, and revised on June 11, 1975, and the orders entered on July 18, 1975, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc*.

OPINION BELOW

The opinion of the Court of Appeals, as revised, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of New York.

JURISDICTION

The judgment of affirmance of the Court of Appeals for the Second Circuit was entered on April 17, 1975. The orders denying petitioner's application for rehearing with suggestion for rehearing *en banc* were entered on July 18, 1975. The judgments and orders are set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

An extension of time until September 15, 1975 to file this petition for a writ of certiorari was granted by Mr. Justice Blackmun on August 14, 1975.

QUESTION PRESENTED

Whether an appellate court should grant a petition for rehearing to review an affirmance based in significant part on a misrepresentation by the Government attorney arguing the appeal?

STATEMENT OF THE CASE

Petitioner and another were convicted in the District Court for the Eastern District of New York after trial of one count of

Obstruction of Justice in corruptly endeavoring to influence a witness before a Grand Jury of the Eastern District of New York to give false testimony (18 U.S.C. §1503) and one count of Conspiracy to Obstruct Justice by endeavoring with another to induce that witness to give false testimony and to procure his co-defendant to commit perjury (18 U.S.C. §§1503, 1622).

In his appeal to the Court of Appeals for the Second Circuit the petitioner argued, *inter alia,* that the Government failed to prove beyond a reasonable doubt that the petitioner knew that the prospective witnesses were to testify before the Grand Jury. Indeed, at the trial petitioner testified that the story he was preparing was intended not for the Grand Jury but for the New Jersey Harness Racing Commission (R945-946, 948-950).*

At oral argument before the Court of Appeals the Government attorney stated that at the time of the fabrication of the story the New Jersey racing authorities were not investigating the activities of the allegedly suborned witness. That representation, totally unsupported by the record, was in error. In fact, as the Government knew and the Government attorney who argued this appeal should have known, testimony at an earlier trial of this matter which resulted in a mistrial revealed that such an investigation was being conducted by the New Jersey racing authorities.

In its decision of April 17, 1975, the Court of Appeals relied heavily on the Government's misrepresentation in its decision:

> ". . . Defendant's suggestion that the story was to be presented to the New Jersey Racing

* References marked "R" are to the trial transcript.

> Commission in the event it investigated Kraft's sons is unpersuasive. *At the time of the August 19th meeting that body was not investigating Kraft Hill Farms, Kraft, Kraft's sons, Gerry, or Turcotte . . . .*
>
> *. . .Since the federal investigation was the only ongoing investigation* and since the evidence established motives for the defendants to concoct the cover story, the jury could properly infer that defendants' object was to obstruct the grand jury proceedings in violation of 18 U.S.C. §1503." Slip op. 2963-64 (emphasis added).

In his petition for rehearing with suggestion for rehearing *en banc* the petitioner argued that since the Court had based its decision in significant part on the factual misrepresentation made by the Government, the Court was obliged to grant a rehearing in order to consider this case in light of the actual facts.

Prior to its decision on petitioner's application for rehearing, the Court revised its opinion to remove its reliance on the Government's misrepresentation. Although it had accepted the Government attorney's representation that there was no New Jersey Harness Racing Commission investigation, albeit unsupported by the record, as a basis for its decision, the Court in a footnote disposed of petitioner's attorney's documented representation that there was such an investigation by noting that this fact was not established at trial.

Following its revision the Court denied petitioner's application for rehearing with suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The Court's refusal to grant petitioner a rehearing of a decision based largely on a misrepresentation by the Government requires review by this Court. This Court's rulings have established that a new trial is required when a misrepresentation by the Government is a material element contributing to a conviction by a jury. See *e.g., Giglio v. United States,* 405 U.S. 150 (1972). The time and duplicate effort required for a rehearing is far less than that required for a new trial, as is the prejudice upon the Government.

The Court should fashion a rule determining that a rehearing of an appeal is required when a misrepresentation by the Government is a material element contributing to an affirmance. The revision by the Court of its original opinion is no substitute for a *de novo* reconsideration of the issue.

This Court should be a vanguard in maintaining the appearance of justice in our judicial system. Consideration of this issue justifies this Court's granting the petition for writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment, opinion and orders of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Lawrence S. Goldman

GOLDMAN & HAFETZ
Attorneys for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS (UNREVISED)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 683, 729—September Term, 1974.

(Argued February 28, 1975 Decided April 17, 1975.)

Docket Nos. 74-2380, 74-2408

UNITED STATES OF AMERICA,

Appellee,

—v—

ELDEN TURCOTTE and
FORREST GERRY, JR.,

Appellants.

Before:

LUMBARD and OAKES, *Circuit Judges,*
and BARTELS,* *District Judge.*

Appeal from judgment of Eastern District, Platt, *J.*, entered after jury trial where defendants were found guilty of obstruction of justice and conspiracy to obstruct justice, and where defendant Turcotte was convicted of perjury, asserting that the evidence was insufficient to sustain the convictions and that the trial judge's charge and rulings on venue, severance, and the scope of cross-examination were erroneous.

Affirmed.

* United States District Judge for the Eastern District of New York, sitting by designation.

Opinion

KENNETH A. HOLLAND, Attorney, Department of Justice, Washington, D.C. 20530 (David G. Trager, United States Attorney, Eastern District of New York, and Peter M. Shannon, Jr., Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

WILLIAM EPSTEIN, Esq., New York, N.Y. (William J. Gallagher, The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., on the brief), *for Appellant Elden Turcotte.*

LAWRENCE S. GOLDMAN, Esq., New York, N.Y. (Goldman & Hafetz, New York, N.Y., on the brief), *for Appellant Forrest Gerry, Jr.*

LUMBARD, *Circuit Judge:*

Elden Turcotte and Forrest Gerry, Jr., appeal from judgments of conviction entered October 11, and October 18, 1974, in the Eastern District (Platt, *J.*) following a jury trial at which they were convicted of obstruction of justice, 18 U.S.C. § 1503, and conspiracy to obstruct justice, 18 U.S.C. § 371, and at which Turcotte was convicted of making a false declaration to a grand jury, 18 U.S.C. § 1623.[1] Defendants argue that the evidence was insufficient to support their convictions, that the trial court made improper rulings on venue and severance, that the charge to the jury was erroneous, that the trial court improperly curtailed the cross-examination of the key government witness and that

1 Gerry was sentenced to two concurrent four-year terms of imprisonment and was fined a total of $10,000. Turcotte was sentenced to three concurrent terms of one year and one day.

Opinion

the United States Attorney improperly cross-examined Gerry. We affirm.

This case arose out of an investigation by a federal grand jury into possible violations of 18 U.S.C. § 224 (sports bribery) in the New York harness racing industry, with particular regard to the fixing of superfecta races at Yonkers and Roosevelt Raceways.[2] In connection with this investigation the grand jury tried to determine whether the registered owners of horses were the actual owners. As part of this phase of its inquiry, the grand jury investigated Gerry's relationship with drivers and trainers such as Turcotte.

Here we are concerned with the attempt allegedly made by Gerry and Turcotte to conceal Gerry's ownership of two horses—Milty Hanover and Adios Misty—from the grand jury. The government's principal witness was David Kraft, who was involved in the superfecta betting scheme and who cooperated with the government after his arrest for perjury following his first grand jury appearance.[3] As a result of Kraft's cooperation the FBI was able to record three conversations which were played for the jury—two of the conversations were between Kraft and Gerry, one was among Kraft, Gerry and Turcotte.

The evidence at trial showed that although Gerry bought Milty Hanover and Adios Misty for cash, the registration form filed with the United States Trotting Association listed the owner of the horse as Kraft Hill Farms, Inc., a

2 The investigation led to the indictment of 28 individuals on sports-bribery charges. Both Turcotte and Gerry were among those tried in the resulting eleven-week trial. The jury acquitted Turcotte, but convicted Gerry. Gerry's conviction was upheld recently by this court. *United States* v. *Gerry*, No. 74-2100, slip op. at 2583 (2d Cir. March 28, 1975). For a description of the superfecta betting scheme, see *United States* v. *Gerry*, *supra*, at 2585-89.

3 Kraft pleaded guilty to race-fixing charges prior to the commencement of this trial.

corporation owned by Kraft's sons. Kraft testified that Gerry asked him if he could register the horses in the corporation's name because Gerry was not licensed to own horses.[4] According to Kraft, Gerry told him he was going to resell the horses immediately and only wanted to use Kraft Hill Farms as a conduit for the transaction. The horses were not immediately resold; they were raced under the Kraft Hill Farms banner and won several purses. When Kraft began receiving the purse checks, he testified that he told Gerry that he wanted the horses taken out of the corporation's name because he was afraid that his sons would get in trouble with the New Jersey racing authorities if Gerry's activities became known. Gerry, on the other hand, claimed that he bought the two horses for Kraft and that he paid for them himself only as a favor to Kraft.

The recorded conversation of August 19, 1973, in which Kraft, Gerry and Turcotte participated was largely concerned with the two horses. When Gerry and Turcotte arrived together at Kraft's house in New Jersey, Gerry introduced Turcotte to Kraft and said, "I wanted you [Kraft] to meet him [Turcotte] just so you could straighten it out . . . . so you guys would both have the same story." There followed a discussion of how Turcotte and Kraft would say they met each other and how they agreed on stabling and training arrangements for Milty Hanover and Adios Misty.

From the transcript of this conversation it appears that Kraft knew virtually nothing about the horses. For example, he did not know from whom or where Gerry bought the horses. Gerry's status as the real owner is also indi-

4 As an unlicensed owner, Gerry could not race horses although he could act as a broker in sales transactions.

cated by his desire to mask any connection he had with the horses. Most of the discussion at the August 19th meeting concerned how Turcotte and Kraft could fabricate consistent stories to explain their dealings without implicating Gerry in some crime.[5] Turcotte's later testimony before the grand jury on September 14, 1973, was amazingly similar[6]

5 Gerry: . . . you, you have got to say I was involved as agent for buying them for you, because if they ever should call Ray Ireland you [would] know how'd he got paid or anything else.

Kraft: He's gonna show you.

Gerry: That's what I'm saying I acted as agent.

Kraft: OK.

Gerry: For you, but he [Turcotte] doesn't have to know.

Turcotte: No, but.

Gerry: He doesn't have to know how you bought the horses or everything.

Kraft: He told us.

Turcotte: I think you mentioned it to me. I'm not gonna deny it.

Gerry: No, no.

Turcotte: I know you.

Gerry: Yeah.

Turcotte: Ah, as a matter of fact the things you, ah, you did happen to mention something, but I didn't think that[.] I know you got a lot of horses here. I don't [—] not really sure I think he said, ah, Forrest, had, had something to do with it. But I heard somebody say it in the paddocks that's all.

6 Q. Mr. Turcotte, have you driven any horses within the last nine months that you know have belonged to Forrest Gerry?

A. That I knew belonged to Forrest Gerry?

Q. Yes.

A. No. I raced horses for a Mr. Kraft Hill Farms that I was under the impression and believe they belong to Kraft Hill Farms. From my understanding just rumors going around, I don't know if there's any truth to it that Forrest Gerry was the agent on these horses that they were bought by him for Kraft Hill Farms. The horses were sent to me registered for Kraft Hill Farms. The money that these horses earned was sent to Kraft Hill Farms. The claim check, when it was claimed, went to Kraft Hill Farms and Kraft Hill Farms as far as I'm concerned, still owes me the money. Now as far as Forrest Gerry owning the horses, not to my knowledge.

to the story that seemed to have been concocted at the August 19th meeting.[7]

I

Gerry and Turcotte first challenge the sufficiency of the evidence against them. Turcotte claims that the government did not establish that his testimony before the grand jury was knowingly false as is required to sustain a conviction under 18 U.S.C. 1623.[8]

There was sufficient evidence from which the jury could infer that Turcotte knowingly testified falsely. Turcotte's claim that he was an innocent bystander at the August 19th meeting is not borne out by the transcript of that meeting. He actively participated in the fabrication of a story concerning the ownership of Milty Hanover and Adios Misty. The answers he gave the grand jury's question were quite similar to what he proposed to tell at the August 19th meeting. The evidence was sufficient to sustain Turcotte's conviction. *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

Both Gerry and Turcotte claim that their convictions for obstruction of justice should be reversed because they did not know that Kraft was going to be called before the grand jury, a fact they contend is an essential element of

7 The other two conversations recorded by the government, and a part of the August 19th conversation from which Turcotte was excluded, dealt with the superfecta race-fixing scheme in which Kraft and Gerry were involved.

8 18 U.S.C. § 1623(a) provides:

> Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

an obstruction of justice case. We find this argument to be unconvincing. Gerry and Turcotte knew that there was a pending federal grand jury investigation into race fixing and hidden ownership of horses. The transcript of the August 19th conversation establishes beyond any doubt that defendants were fabricating a story about Adios Misty and Milty Hanover to tell an inquiring authority. Defendant's suggestion that the story was to be presented to the New Jersey Racing Commission in the event it investigated Kraft's sons is unpersuasive. At the time of the August 19th meeting that body was not investigating Kraft Hill Farms, Kraft, Kraft's sons, Gerry, or Turcotte. Moreover, the August 19th meeting appears to have been arranged by Gerry, not by Kraft, and the fabricated story came mainly from Turcotte's lips. Since neither Gerry nor Turcotte had anything to fear from (or even any interest in) a New Jersey investigation, it is difficult to believe that the object of the meeting was to prepare for a New Jersey investigation.[9] On the other hand, the ongoing federal investigation into race fixing which was known to and concerned both Gerry and Turcotte, gave them a motive for fabricating a story for the grand jury.

While it is true that no explicit reference to the pending grand jury investigation was made during the taped conversations,[10] we have previously held that circumstan-

9 At the August 19th meeting Turcotte indicated he wanted to meet Kraft so if "they" ever put Kraft in a lineup with FBI agents and asked Turcotte to identify Kraft, he would not pick an FBI agent out of ignorance. Although it is not clear to whom "they" refers, the reference to the FBI in this statement shows that Turcotte was concerned with the federal investigation not a non-existent New Jersey investigation.

10 The taped conversations did contain some references to grand jury investigations. For example, Gerry explained to Kraft at their August

tial evidence is sufficient to uphold an obstruction of justice charge. *United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960). Here the evidence showed that defendants arranged the meeting, took the active role in fabricating a story about the two horses, and knew that a federal grand jury was investigating the ownership of the horses. Since the federal investigation was the only ongoing investigation and since the evidence established motives for the defendants to concoct the cover story, the jury could properly infer that defendants' object was to obstruct the grand jury proceedings in violation of 18 U.S.C. § 1503.[11]

Finally defendants suggest that there was no evidence establishing a conspiracy. It is well established that a jury can infer an agreement to violate a law from circumstantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Once the jury determined that Gerry and Turcotte were guilty of obstructing justice, they could infer that they had agreed to do so from the facts that they arrived together at Kraft's farm and both participated in the formulation of the cover story.

4th meeting that he had learned a lot from his involvement in a 1966 grand jury investigation into twin-doubles betting when he said he went through the same problems as he was now having with the superfectas. (What he learned was not to have the people involved in a betting scheme associate with each other in public lest the grand jury "put it to them" by questioning them about such meetings.)

11 Turcotte argues that the trial judge erred in failing to grant his motion to dismiss the obstruction of justice count because of improper venue. While it is true that Turcotte's part in the obstruction of justice occurred in New Jersey, trial in the Eastern District was permissible because Turcotte waived any objection he had to venue when his counsel withdrew the motion to dismiss for improper venue prior to trial. *United States* v. *Price*, 447 F.2d 23, 26-28 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971); *United States* v. *Rivera*, 388 F.2d 545 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968). See generally C. Wright, *Federal Practice & Procedure—Criminal* § 306 (1969).

II

Turcotte also argues that the trial court erred in denying his motion to have his trial severed from that of Gerry. He suggests that Gerry's notoriety as a recently convicted race fixer would lead the jury to impute Gerry's wrongdoings to him.

Turcotte's claims of prejudice are unpersuasive. Any possible juror prejudice against Gerry or Turcotte as a result of publicity from the recent race-fixing trial could be (and presumably was) prevented by careful examination of prospective jurors by defense counsel prior to the impanelment of the jury to determine if they had been exposed to any publicity concerning the race-fixing trial. Moreover, this was a relatively simple case and Turcotte was significantly involved in each count of the indictment. While it is true that a limited overview of Gerry's role in a superfecta betting scheme came out at the trial, it was necessary in order to provide the jury with the background against which this case arose. Since the trial judge specifically instructed the jury that it was not to consider any evidence regarding the superfecta betting scheme when it deliberated on Turcotte's guilt or innocence, Turcotte was not prejudiced by this joint trial.

The trial judge is normally afforded wide discretion in deciding whether to order a severance. 1 C. Wright, *Federal Practice & Procedure—Criminal* § 227 (1969). That discretion was not abused in this case. Compare *United States* v. *Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966).[12]

---

12 Turcotte also objects now (but he did not at trial) to two isolated portions of the trial court's charge to the jury. The first portion of the charge to which Turcotte objects, dealing with his relationship to race-fixing, is taken out of context. The succeeding portion of the charge

III

Turcotte and Gerry next argue that the trial court so abused its discretion in restricting their cross-examination of Kraft that their convictions should be reversed. Four instances are given of such alleged improper curtailment of cross-examination: First, they were not allowed to question Kraft about a 1960 felony conviction in New Jersey for atrocious assault and battery. Since the conviction was 14 years old and did not relate to Kraft's truthfulness, the trial court did not abuse its discretion when it did not allow cross-examination about that conviction. See *United States* v. *Owens,* 263 F.2d 720, 722 (2d Cir. 1959); Fed.R.Ev. 609 (effective July 1, 1975).

Second, the defendants argue that it was improper for the trial court to prohibit them from asking Kraft whether he had been denied his request for immunity and whether he had told Gerry that he had been denied immunity. The record discloses that the first question was asked and answered in the presence of the jury. While the second question was asked and answered outside the jury's presence, the trial court never ruled that it could not be asked in the jury's presence. What the trial court did not permit was a series of questions that assumed that Kraft had legal knowledge about immunity that he claimed he did not have.

made it clear that the jury was not to consider evidence of race-fixing in determining Turcotte's guilt or innocence.

Turcotte also suggests that it was error for the trial judge to tell the jury that they could infer that Turcotte knew his statement was false if it was in fact false. We disagree. See *United States* v. *Sweig,* 441 F.2d 114, 117 (2d Cir.), *cert. denied,* 403 U.S. 932 (1971). In any event, the judge told the jury that "[i]f after hearing all of the testimony, you have a reasonable doubt in your mind as to whether or not the defendant, Elden Turcotte, believed the declarations made by him were true, then you must resolve that doubt in his favor and find him Not Guilty." The trial court's charge was proper.

Finally, defendants complain of two occasions when the trial judge limited the scope of their cross-examination of Kraft concerning his motives to testify falsely in favor of the government. Defendants are usually afforded considerable latitude in exploring such motives in their cross-examination of the principal government witnesses against them. *Gordon* v. *United States,* 344 U.S. 414 (1953); *United States* v. *Miles,* 480 F.2d 1215 (2d Cir. 1973).

Here defendants object to the trial court's refusal to allow them to question Kraft about a New Jersey criminal charge of receiving stolen property then pending against him and its refusal to allow them to examine Kraft on whether he had requested to be sentenced on his sports-bribery conviction prior to their trial. While Kraft was asked the latter question, he replied that he didn't know how to answer it and the trial court later refused to let the defendants inquire further into this matter unless they produced some record document that established that such a request had been made.

The trial court, of course, has discretion in deciding how far defendants can go with such cross-examination. If the jury is otherwise in possession of sufficient information concerning the witness' possible motives for testifying falsely in favor of the government, there is no abuse of discretion if a judge restricts the cross-examination of a government witness. *United States* v. *Miles, supra; United States* v. *Blackwood,* 456 F.2d 526, 530-31 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972).

While we think that the trial court should have permitted further questioning about these matters, we do not see how the defendants could have been seriously prejudiced by the court's restrictions.

The trial court did permit defendants to ask Kraft if his testimony was motivated by any promises by the government (which would include a promise to intercede with

the New Jersey authorities). In addition, the jury was well aware of the fact that Kraft had already pleaded guilty to a sports-bribery charge on which he had not been sentenced and it could infer from this that Kraft expected leniency because of his cooperation with the government. The trial judge also allowed extensive cross-examination of Kraft as to statements he made which indicated he expected leniency from the government. See Record at 589-610.

IV

Lastly, Gerry argues that the trial court permitted too broad a cross-examination of him when he took the stand in his own defense. He points to three specific instances.

First, Gerry claims he was prejudiced by certain questions that the trial judge permitted the government to ask concerning Gerry's girl friend, Connie Rogers.[13] Gerry was asked if he knew that she had been called before the grand jury and that she had been subsequently arrested for cashing superfecta tickets under a false name. He was also asked whether that arrest had resulted in conviction, but an objection to that question was sustained. The first two questions were permissible—they were asked in an effort to establish that Gerry knew of the grand jury's existence and that its investigation concerned betting on the superfectas. The last question was improper and the trial judge correctly sustained the objection. Gerry's knowledge of Ms. Roger's conviction was in no way related to whether he knew the grand jury was investigating the harness racing industry. If anything it can be viewed as an attempt by the government to suggest Gerry associated with law-breakers.

---

13 The government did not ask whether Ms. Rogers was Gerry's girl friend; that information was volunteered by Gerry when he was asked if he knew Ms. Rogers.

Second, Gerry claims that the trial judge gave the government too much freedom in cross-examining him concerning his superfecta betting. Since Gerry was accused of trying to influence Kraft's testimony with regard to superfecta betting, we think it was proper for the trial judge to allow the government briefly to question Gerry about the scope of his involvement and his betting, especially since the subject had been brought up during the direct examination by Turcotte's lawyer. It had also been discussed by Kraft in testimony elicited both by defendants and the government. The government's inquiries did not indicate that the betting scheme was illegal and the trial judge repeatedly stressed that neither defendant was accused of race-fixing. Thus, Gerry was not prejudiced by the cross-examination concerning the superfectas.

Finally, Gerry objects to having been asked if he had been accused of race-fixing in 1966. Although an objection was sustained by the trial judge, Gerry denied that he had been so accused. Government counsel should not have asked this obviously improper question. While the trial judge can, and did in this case, sustain objections to such improper questions, the jury is left with the impression that the answer to the questions must be yes. However, we do not feel that this conduct merits reversal here, especially in light of the substantial evidence against Garry.

Affirmed.

REVISION OF ORIGINAL OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

United States Courthouse

Foley Square

New York 10007

DANIEL FUSARO
Clerk

June 11, 1975

U.S.A. v. Turcotte & Gerry
Docket Nos. 74-2380, etc. Decided April 17, 1975

In Judge Lumbard's opinion in the above-entitled case the following changes have been made:

Page 2963, line 11 — delete "body was not investigating" and insert "body, so far as appears from the record, was not investigating" in place thereof.

Page 2963, line 12 — after "Gerry, or Turcotte." insert "8a/"

Revision of Original Opinion

Page 2963, line 13 — delete "Moreover" and insert "Indeed" in place thereof.

Page 2963, before footnote 9 — insert the following:

"8a/ In a petition for rehearing we are informed by Gerry's counsel that "in a telephone conversation" he was told by the steward for the New Jersey Harness Racing Commission that a state investigation of Kraft Hill Farms and the two Kraft sons had begun on August 15, 1973. This fact was not established at trial; nor was it shown when, if ever, the New Jersey authorities informed Kraft that they were conducting an investigation. In any event, Kraft testified at the trial that the attempts to influence his testimony concerned the federal investigation and not any New Jersey investigation. Transcript at 422."

Page 2964, line 7 — delete entirely.

Page 2964, line 8 — delete "vestigation and since" and insert "Since" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hd

ORDERS OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,

HON. JAMES L. OAKES,
Circuit Judges

Hon. John R. Bartels,
District Judge

United States of America,

Plaintiff-Appellee,

v.

Elden Turcotte, Forrest Gerry, Jr.,

Defendants-Appellants.

74-2380

Orders

A petition for a rehearing having been filed herein by counsel for the appellant, Forrest Gerry, Jr.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

s/ Vincent A. Carlin
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of July, one thousand nine hundred and seventy-five.

United States of America,

Plaintiff-Appellee,

v.

Elden Turcotte, Forrest Gerry, Jr.,

Defendants-Appellants.

74-2380

Orders

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Forrest Gerry, Jr., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Wilfred Feinberg
WILFRED FEINBERG
Acting Chief Judge

No. 75-398

Supreme Court, U. S.
FILED
DEC 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

FORREST GERRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-398

FORREST GERRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals should have granted his petition for rehearing because a factual representation by government counsel in oral argument based on the record was incorrect, notwithstanding that the court revised its original opinion to reflect the corrected fact.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of having attempted, with co-defendant Elden Turcotte, to obstruct justice by endeavoring to persuade David Kraft to testify falsely before a grand jury, in violation of 18 U.S.C. 1503 (Count II); and of having conspired with co-defendant Turcotte to obstruct justice through Turcotte's perjury before a grand jury and through their endeavor to persuade David Kraft

to give false grand jury testimony, in violation of 18 U.S.C. 371 (Count III).[1] Petitioner was sentenced to two concurrent four-year terms of imprisonment to run concurrently with an earlier sentence imposed by the same court,[2] and was fined $5,000 on each count. The court of appeals affirmed (Pet. App. 1a-13a; 515 F. 2d 145). Petitioner filed a motion for rehearing with suggestion for rehearing *en banc*. The court of appeals revised its original opinion (Pet. App. 14a-15a) and then denied rehearing (Pet. App. 16a-18a).

1. In May 1972, a special federal grand jury for the Eastern District of New York commenced an investigation into possible violations of 18 U.S.C. 224, the Federal Sports Bribery Statute (Tr. 65). The grand jury concentrated on the harness racing industry in New York, and focused upon superfecta races in particular (*ibid.*).[3] It inquired into the ownership of harness racing horses (Tr. 67, 105), and the nature of petitioner's relationship with driver-trainers, in particular driver-trainer Elden Turcotte (Tr. 67-68). Among the witnesses called was David Kraft, who testified before the grand jury on May 21, 1973. Thereafter, Kraft was charged with perjury. After he agreed to cooperate with the government he again testified before the grand jury on September 10, 1973 (Tr. 166).

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[1]Petitioner was separately convicted of influencing the outcome of horse races by bribery, and conspiracy to commit this offense, in violation of 18 U.S.C. 224 and 371. *United States* v. *Gerry*, 515 F.2d 130, certiorari denied, No. 74-1480, October 6, 1975.

[2]Co-defendant Elden Turcotte was convicted on Counts two and three and was convicted on Count one of having perjured himself before the grand jury in violation of 18 U.S.C. 1623. Turcotte was sentenced to three concurrent one-year-and-a-day sentences.

[3]A superfecta is a race in which a winning bettor must select the first four horses in their order of finish. The grand jury was concerned with the superfectas because of the large amounts of money normally bet in them (Tr. 65).

At petitioner's trial, David Kraft testified that in March 1973, petitioner obtained his permission to put some horses in the name of Kraft Hill Farm[4] as a conduit for resale (Tr. 150-151).[5] In April 1973, Kraft became aware that two horses not belonging to Kraft Hill were racing under its name and that the purse winnings were being forwarded to Kraft Hill (Tr. 154-156, 247-251). Kraft spoke to petitioner about getting the horses out of Kraft Hill's name (Tr. 155), because he was apprehensive that the hidden ownership might adversely affect his sons' licenses to own horses (Tr. 158).

On July 21, 1973, petitioner informed Kraft that he was aware that Kraft had been before the federal grand jury, and that he was the only one who could hurt him in this investigation (Tr. 160-161). When Kraft complained to petitioner that the horses were still in Kraft Hill's name, petitioner responded that Turcotte had registration papers and that petitioner would bring the papers to Kraft so that the horses might be transferred to Turcotte (Tr. 165-166).

On August 4, 1973, petitioner told Kraft to tell the grand jury that "we have to say about this betting scheme that I called you up and gave you some horses that I handicapped, and you went to OTB [Off Track Betting] and bet them for me because I didn't have the time to get there. * * * This should take care of the extra few tickets that you said you cashed. If you say

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[4]Kraft Hill Farm is a corporation, the initial capitalization of which emanated from a transfer of racing horses originally owned by David Kraft to his two sons (Tr. 150-152). David Kraft's license to own horses had been revoked (Tr. 152), and Kraft's son Terry became the president of Kraft Hill Farm (Tr. 176).

[5]As an unlicensed owner, petitioner could not race horses although he could act as a broker in sales transactions (Pet. App. 4a).

it that way, that will cover everything" (Tr. 170). Petitioner also tendered the registration papers for the two horses so that Kraft could insert the name of Elden Turcotte (Tr. 173).

On August 19, 1973, petitioner introduced Turcotte to Kraft, explaining that Turcotte must be able to recognize Kraft "[i]n the event this investigation gets to a point where somebody has to know what they are talking about * * * " (Tr. 181). Turcotte then related a fabricated story about how he had received the two horses from Kraft and how the horses were eventually sold (Tr. 181-183).

Kraft testified that Turcotte told him this story so as to coordinate their statements "to the grand jury or to the FBI or any agency I am involved with regarding the ownership of the horses that * * * Turcotte has in his possession * * * " (Tr. 181). Turcotte also told Kraft that "you've got to say you raced these horses with me and this is the story we have to get together on" (Tr. 183). After Turcotte's departure, petitioner told Kraft that he would not get in any trouble over the superfecta investigation, and if Kraft would just tell "them" that he had purchased the horses for $21,000 and that they were owned by Kraft Hill Farm, there would not be any problem (Tr. 186).[6]

On August 30, 1973, Kraft told petitioner that he had informed the federal government of everything there was to know about the horses (Tr. 190-191). Petitioner responded: "Wholly mackeral, I told you to tell them about—tell them you own them damned horses and there wouldn't be no trouble" (*id.* at 191).

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[6]On cross-examination, Kraft testified that petitioner knew that Kraft had been arrested for perjury, and that Kraft had informed petitioner that he had been down there and "they" questioned him (Tr. 344).

In his defense petitioner testified that Kraft had requested him to notify Kraft if he saw any horses for sale; that petitioner informed Kraft of the availability for purchase of two horses, but that Kraft did not want to purchase the horses until the insurance proceeds from a dead horse arrived; that Kraft was to reimburse petitioner when the insurance proceeds became available; and that petitioner sent the horses to Turcotte to train and race at Kraft's suggestion (Tr. 942-944).

Petitioner also testified that Kraft told him the New Jersey authorities had commenced checking into their ownership of horses and that he wanted to meet with Turcotte to get a story straight to protect his sons' licenses in case the New Jersey Racing Commission[7] questioned his sons and Turcotte (Tr. 945, 950).[8]

2. On oral argument, before the court of appeals, counsel for the government said that there was no investigation in New Jersey at the time of the August 19th meeting. This fact was noted in the original opinion filed by the court of appeals affirming the conviction

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[7]On cross-examination, David Kraft testified that there was no investigation in New Jersey and that petitioner's attempts to influence his testimony concerned the federal investigation (Tr. 422).

[8]On cross-examination, petitioner admitted that he knew his own name had been brought up in the grand jury investigation of the superfectas, and that the FBI was acting as the investigator for the grand jury (Tr. 983, 988). Kraft's testimony revealed that on August 4, 1973 petitioner told him that in previous years he became involved with the twin doubles and got trapped because he had associated with all the "fellows" together (Tr. 171). Kraft testified that petitioner told him that this would not happen again because the fellows he fixed (the drivers at the race tracks), for instance A, B & C, were told not to see each other, and petitioner would take messages back and forth between them (Tr. 171-172). On cross-examination, petitioner testified he remembered making these comments at the August 4 meeting with Kraft (Tr. 992-993). Petitioner also conceded on cross-examination that he remembered discussing with Kraft the subject of grand juries (Tr. 1024-1025; Pet. App. 7a-8a, n 10).

(Pet. App. 7a-8a). In his petition for rehearing, petitioner argued that its opinion relied heavily on a statement that on August 19, 1973, the New Jersey Racing Commission was not investigating Kraft Hill Farm or Kraft's sons (Pet. Rh. 3)[9]. This statement, he argued, was made by government counsel on oral argument, but was factually incorrect. Accordingly, petitioner's testimony at trial that Kraft told him that the New Jersey Racing Commission was investigating Kraft Hill Farm, and Kraft's denial that there was then such an investigation (n. 7, *supra,* p. 5), constituted the only evidence relative to the New Jersey investigation.

Upon this basis petitioner requested the court to "reconsider its decision in light of the actual facts" (Pet. Rh. 5). In light of the request for rehearing, the court of appeals revised its opinion affirming petitioner's conviction (Pet. App. 14a-15a). In this Court, petitioner again asserts that the representation of government counsel was "totally unsupported by the record" (Pet. 3).

While some type of New Jersey investigation apparently commenced on August 15, 1973, the date alleged in his request for rehearing,[10] this did not require the court

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[9]"Pet. Rh." refers to the court of appeals petition for rehearing with suggestion for rehearing *en banc,* a copy of which is being lodged with this Court.

[10]In his petition for rehearing petitioner drew upon facts outside the record to support his claim that there was an investigation in New Jersey. In a previous trial in which petitioner and Elden Turcotte were involved, and in which a mistrial was declared, Mr. Greenberg, the State Steward for the New Jersey Harness Racing Commission, testified that there was an investigation of Kraft Hill Farm and that Kraft Hill's license and the license of Kraft's two sons to own horses were suspended on September 27, 1973 (Pet. Rh. App. 10). Greenberg did not testify when the investigation commenced. In his petition for rehearing, petitioner additionally relied upon a telephone conversation between his counsel and Greenberg on April 26, 1975, that an investigation commenced on August 15, 1973, four days prior to the August 19 meeting between Kraft, petitioner and Turcotte at which the fabricated story was discussed. We understand that on August 15, 1973, an investigator for Harness Track Security talked to a confidential source relative to Kraft Hill Farm. However no open inquiry took place until September 24, 1973, at which time a hearing was held on the possibility of hidden horse ownership.

of appeals to rehear the case. It was sufficient that the court below reconsidered the matter, and in light of the correct information, modified its opinion. The court noted in its modification that the fact of a New Jersey investigation was not established at trial, nor was it shown when, if ever, the New Jersey authorities informed Kraft that they were conducting an investigation (Pet. App. 15a). The court also noted that David Kraft's testimony concerned the federal investigation and not any New Jersey investigation (*ibid.*). In these circumstances, the court of appeals properly upheld petitioner's conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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